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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WALTER L. NIXON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This case raises the question of whether a Senate impeachment trial violated the Constitution because a Senate committee conducted virtually all aspects of the trial, with the full Senate participating in only the final deliberations and vote. Petitioner argues that the Constitution requires the full Senate to conduct an impeachment trial, based on the command that the Senate shall "try" all impeachments. Art. I, § 3, cl. 6. Respondents and the United States Senate (collectively referred to as respondents) argue first that the Constitution's commitment to the Senate of "the sole power to try all impeachments" renders a challenge to

the Senate's trial procedures nonjusticiable, and second, that the Senate is not constitutionally precluded from using its committee procedure. Both the district court and two court of appeals judges concluded that this case presents a nonjusticiable controversy. App. B at 58a to Petition for Certiorari; App. A at 1a and 16a (Williams, J., & Randolph, J.); *but see id.* at 18a (Edwards, J., dissenting).

Public Citizen files this brief as *amicus curiae* to respond only to the contention that this case is not justiciable; it does not address the issue of whether the proceeding conducted by the Senate meets the requirements of the Constitution. Public Citizen regularly litigates cases that challenge governmental actions on the grounds that they violate the Constitution or applicable statutes. In many of these cases, the government has argued that the case presents a nonjusticiable political question. For example, this defense was raised in a case in which Public Citizen attorneys represented more than one hundred Members of Congress challenging the stationing of troops in the Persian Gulf without compliance with the War Powers Act. *Lowry v. Reagan*, 676 F. Supp. 333, 339-40 (D.D.C. 1987), *appeal dismissed in unpublished order*, No. 87-5426 (D.C. Cir. Oct. 17, 1988). Most recently, the government has contended that the issue of whether environmental impact statements must be prepared on international trade agreements is a political question, in part, because it asserts that the negotiation of trade agreements is textually committed by the Constitution to the President. *Public Citizen v. Office of the U.S. Trade Representative*, No. 92-5010 (D.C. Cir. argument scheduled May 4, 1992). As an outgrowth of its own litigation over the political question doctrine, Public Citizen has an interest in ensuring that this doctrine is confined to those rare instances that truly present issues that are beyond the province of the courts.[1]

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[1] Counsel for the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

SUMMARY OF ARGUMENT

The political question doctrine is often invoked by parties in litigation to prevent the courts from conducting one type of inquiry for which they are well-suited -- deciding whether particular constitutional provisions constrain the Legislative or Executive Branches. In such cases, of which this is an example, the government contends that the matter is textually committed by the Constitution to one of the political branches, and that a judicial ruling would express lack of respect due that branch of government.

The first inquiry -- whether the Constitution contains a demonstrable textual commitment that entirely ousts the courts -- is clearly justiciable. After all, it is the province of the courts to interpret the Constitution and to say what the law is, *i.e.*, whether the Constitution gives one of the political branches unreviewable discretion in a particular area.

The second basis for invoking the political question doctrine -- that a judicial decision will express disrespect for another branch -- rises or falls with the first. If a power is committed by the Constitution to the Legislative or Executive Branch to the exclusion of the courts, then the courts have no role in passing on the question, and hence no opportunity to express a lack of respect. On the other hand, if there is no exclusive textual constitutional commitment of the power at issue, then the courts have a role, and they are not precluded from adjudicating the dispute simply because others might consider a decision that is adverse to one of the political branches to express a lack of respect for that branch.

ARGUMENT

I. DECIDING WHETHER CONSTITUTIONALLY COMMITTED POWERS HAVE JUDICIALLY ENFORCEABLE LIMITATIONS IS NOT BARRED BY THE POLITICAL QUESTION DOCTRINE.

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), this Court reviewed the history of the political question doctrine and con-

cluded that the political question doctrine comes into play only when one of certain factors is prominent. The Court's listing included the two factors invoked by respondents in this case: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," and (2) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." 369 U.S. at 217.

Before explaining why neither of these factors makes this case nonjusticiable, it is important to stress that this case does not involve the part of the political question doctrine that precludes adjudication of issues where judicially manageable standards are lacking. Indeed, this case presents legal issues that the courts are not only well-equipped to decide, but that they regularly decide: whether a trial -- criminal, civil, or administrative -- comports with what is constitutionally required for that kind of proceeding. Thus, respondents have never contended that this case presents an issue for which there are no judicially manageable standards. Rather, respondents' sole contention is that the Constitution assigns to the Senate the exclusive power to decide what an impeachment trial will entail, and that, even if that trial consisted entirely of flipping a coin, the courts have no power to review that decision.

In evaluating respondents' preclusion claim, it is appropriate to recall that it was established early in this country's constitutional jurisprudence that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This is especially true where a governmental action is alleged to violate the Constitution. As the Court stated in *Marbury*, "[s]o if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty." *Id.* at 177-78; *see also United States v. Nixon*, 418 U.S. 683, 703 (1974) (reaffirming *Marbury*).

In our system, the courts can and do decide whether an action exceeds limitations imposed on a constitutional grant of power. The inquiry in such cases is one for which the courts are particularly well-suited. The courts must interpret the Constitution to determine whether there are any constraints on the power being exercised. The most likely constraints on the grant of power are those contained in the constitutional grant of power itself, or those established by other fundamental rights or constitutional principles. If there are any such limitations, then the courts have the power, and indeed the duty, to decide whether the challenged action exceeds those limitations.

It is only where the Constitution directs that a challenged action is within the exclusive province of one of the political branches that the courts are without authority to review the action. While challenges to such actions could be called "political questions," that kind of determination is only reached at the conclusion of what is often an in-depth judicial analysis of the Constitution, against the backdrop of the history of the constitutional convention and its aftermath. *See, e.g.*, App. A (Williams, J.) Indeed, in *Baker v. Carr*, 369 U.S. at 211, the Court recognized that the judiciary has a vital role in deciding whether a question has been committed entirely to another branch:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is the responsibility of this Court as the ultimate interpreter of the Constitution.

In other words, the court is not abstaining from ruling in such a case. Instead, it is construing the constitutional provisions at issue to determine whether the Constitution establishes judicially enforceable limitations on the actions of another branch.

Even where the court concludes that it has no power to decide the underlying legal question, it reaches that conclusion not because the judiciary is necessarily incapable of making that

legal determination. To be sure, there are instances in which the Constitution assigns to one of the political branches a particular type of determination that the courts are ill-equipped to decide, such as whether a state government is republican or not, or whether a certain country or ambassador should be recognized. *See Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). In such cases, the issue may be seen as textually committed to another branch, but that is principally because there are no manageable standards for the courts to apply in deciding the issue.

However, the Constitution also commits matters to the political branches that the courts are quite capable of deciding. For example, the courts could make factual determinations as to which of two candidates received the most votes in a congressional election. Nonetheless, the Constitution may still assign those determinations to another branch of government, not because there are no judicially manageable standards, but because the Framers decided, for other reasons, that the function should be performed by another branch of government. In those cases, the courts are precluded from ruling on the merits of a challenge in much the same way that the courts are precluded from evaluating certain agency actions under the Administrative Procedure Act, 5 U.S.C. § 701(a)(1) and (2).

Whatever the result, the courts cannot avoid their judicial duty to construe constitutional provisions to ascertain whether the courts have been denied a role in the process and hence whether another branch will have the final say. Most recently, this Court held unanimously that the political question doctrine does not bar judicial review of Congress's selection of a particular apportionment method. *Department of Commerce v. Montana*, 60 U.S.L.W. 4279 (U.S. March 31, 1992). The Court found it significant that the parties agreed that Article I, section 2, clause 3 of the Constitution imposes some limitations on Congress's apportionment power that are judicially enforceable, but offered differing interpretations of those limitations. 60 U.S.L.W. at 4283. Faced with the task of deciding the proper interpretation, the Court stated that a decision that a constitutional provision is not judicially enforceable "is of course very different from deter-

mining that a specific congressional action does not violate the Constitution. That determination is a decision on the merits that reflects the *exercise* of judicial review, rather than an *abstention* from judicial review that would be appropriate in the case of a true political question." *Id.* at 4284 (footnote omitted, emphasis in original).

Similarly, in *Powell v. McCormack*, 395 U.S. 486 (1969), the Court upheld a challenge to the House of Representative's exclusion of one of its Members, who had argued that the House had no constitutional power to refuse to seat him since he met the qualifications for office set forth in Art. I, § 2, cl. 2. The congressional officials took the position that, by making each House the judge of the qualifications of its own members, Art. I, § 5, cl. 1, the Constitution gave the House unreviewable authority to decide whom to seat.

In rejecting the contention that the case presented nonjusticiable political questions, the Court laid out two possible constructions of the constitutional provision at issue:

> If examination of § 5 disclosed that the Constitution gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine. On the other hand, if the Constitution gives the House power to judge only whether elected members possess the three standing qualifications set forth in the Constitution, further consideration would be necessary to determine whether any of the other formulations of the political question doctrine are "inextricable from the case at bar."

395 U.S. at 520-21 (footnotes and citation omitted). The Court then found no barrier to judicial review and ruled that the Constitution does not give the House the power to exclude Members based on qualifications other than those set forth in the Constitution. In a footnote, the Court elaborated on the applica-

bility of the political question doctrine, stating:

> Consistent with this interpretation, federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications. This is an issue not presented in this case and we express no view as to its resolution.

Id. at 521 n.42. In other words, if there were disputed evidence concerning a Member's length of residency, and the House made a determination that the Member did not meet the constitutional residency qualification, there might be no right to judicial review of that determination.

The Elections Clause, Art. I, § 5, cl. 1, gives Congress this type of unreviewable authority to judge the elections of its Members. Thus, each House is the sole determinant of which candidate is entitled to a seat in Congress, and the courts have no role in reviewing that determination. *See Roudebush v. Hartke*, 405 U.S. 15, 18-19 (1972); *accord Morgan v. United States*, 801 F.2d 445, 449-51 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 911 (1987); *McIntyre v. Fallahay*, 766 F.2d 1078, 1081-82 (7th Cir. 1985); *id.* at 1087 (Swygert, J., dissenting on other grounds). Such preclusion is based not on any inability of the courts to decide the outcome of disputed elections, but on the Constitution's assignment of the power to the House of Representatives for other reasons, such as the need for a prompt decision and political accountability. However, even that preclusion does not bar judicial challenges of legislative resolutions of disputed elections that exceed other constitutional limitations. *See Morgan*, 801 F.2d at 451.

Similarly, although the Constitution gives Congress the power to determine the rules of its proceedings, that power is constrained by other constitutional provisions and by fundamental rights. *United States v. Ballin*, 144 U.S. 1, 5 (1892). It is, therefore, within the judicial authority to decide whether a congressional rule violates these general constitutional norms. In contrast, since the Constitution does not prescribe how the presence of a majority in either House of Congress is to be

determined, this Court has held that "it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain that fact." *Id.* at 6.

Likewise, while Congress has the constitutional power "to establish an uniform rule of naturalization," Art. I, § 8, cl. 4, the political question doctrine does not oust the courts from deciding whether the means chosen to implement that power are unconstitutional. *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 940-42 (1983); *see also Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 111 S. Ct. 2298, 2309 (1991) (Congress's exercise of its power to dispose of federal property, Art. IV, § 3, cl. 2, is constrained by the doctrine of separation of powers); *South Dakota v. Dole*, 483 U.S. 203, 206-08 (1987) (Congress's power under the Spending Clause, Art. I, § 8, cl. 1, is limited by that Clause and by fundamental rights); *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 249-50 (1985) ("Congress' plenary power in Indian affairs under Art. I, § 8, cl. 3, does not mean that litigation involving such matters necessarily entails nonjusticiable political questions"); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977) (Congress' power to regulate Indian affairs is subject to constitutional limitations).

Not only is it within the province of the courts to determine whether the challenged actions exceed any limitations imposed by the Constitution, but judicial exercise of that power is also not barred because of any lack of respect for a coordinate branch that might ensue. *See Powell*, 395 U.S. at 548-49. As Justice Powell stated in his concurring opinion in *Goldwater v. Carter*, 444 U.S. 996, 1001 (1979), "[i]nterpretation of the Constitution does not imply lack of respect for a coordinate branch." On the other hand, if the Constitution commits unreviewable power to one of the political branches, then the judiciary would usurp that branch's constitutional role by deciding that the branch exceeded its constitutional authority. Such usurpation would show disrespect only because the judiciary has no role in the matter, not because it disagrees with the other branch. In other words, the lack of respect prong of the political question has no meaning when the

real issue is whether the Constitution grants unreviewable decision-making power to another branch of government.

II. THE COURTS HAVE THE POWER TO DECIDE WHETHER PETITIONER'S IMPEACHMENT TRIAL VIOLATED THE CONSTITUTION.

Apart from the particular clause at issue here, the Constitution establishes several other constitutional constraints on the Senate's power to try impeachments that even respondents concede give rise to judicially enforceable rights. Opp. Cert. at 13; App. 42a, 68a. Thus, the Senate's power applies only to civil officers who have been impeached by the House, and then only for impeachable offenses; the Senate must be under oath or affirmation; the Chief Justice must preside when the President is tried; and two-thirds of those present must vote for a conviction. Art. I, § 3, cl. 6 & § 2, cl. 5; Art. II, § 4. In addition, the only judgment that may constitutionally be rendered is removal from office and disqualification from holding future offices of the United States. Art. I, § 3, cl. 7. In each of these respects, the Constitution imposes constraints on the Senate's impeachment power.

As Professor Louis Henkin has concluded, the courts have the power to review Senate impeachment proceedings "for constitutional excesses or infirmities." Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597, 605 n.26 (1976). If the Senate convicted an individual who did not hold civil office or who had not been impeached by the House of Representatives, certainly a court has the power to enforce the constitutional limitations on the Senate's power. Indeed, respondent's opposition to certiorari appears to concede that the courts might be able to hear such a case. Opp. Cert. at 13. Similarly, if the Senate refused to permit the Chief Justice to preside over the impeachment trial of the President, or it did not sit under oath or affirmation, or it convicted an individual by a simple majority vote, the courts would have the power to declare that action unconstitutional. The same would be true if the Senate sought to impose monetary sanctions or some other penalty different from removal from office and future disqualification.

Given these clear constitutional constraints on the Senate's impeachment power, respondents, like the government in *Department of Commerce v. Montana*, "do[] not suggest that all congressional decisions relating to [impeachment] are beyond judicial review." 60 U.S.L.W. at 4283. Where the parties differ is over the extent to which the Constitution imposes judicially enforceable rights in the impeachment context.

Specifically, respondents contend that, because the Constitution states that "[t]he Senate shall have the *sole* power to try all impeachments," Art. I, § 3, cl. 6 (emphasis added), the courts have no role in deciding whether a particular impeachment proceeding comports with the constitutional mandate to "try" impeachments. However, this argument gives far too much weight to the use of the word "sole." First, the Constitution obviously does not give the Senate an entirely free rein in the impeachment arena, as illustrated by the numerous constitutional limitations described above that constrain the Senate's impeachment power. Second, whatever the Senate's sole power is, it is assigned to the Senate, which, under other provisions of the Constitution, must have a majority to do business. Art. I, § 5, cl. 1. Therefore, even if the Senate has the sole (and unreviewable) power to decide the precise procedures to employ in an impeachment trial, it may be constitutionally precluded from rendering a verdict unless a majority of the Senate is present. Third, simply because the Constitution gives the Senate the sole power to conduct impeachment trials does not necessarily mean that the term "try" is devoid of any limitations on the type of proceeding to be conducted. A more logical inference is that the Constitution makes the Senate the final judge of guilt or innocence, subject to whatever procedures the term "try" imposes on the proceeding. Since the courts have a role in determining whether impeachment proceedings violate the other constitutional limitations described above, there is no reason to believe that the Framers intended to oust the courts from deciding whether the term "try" imposes other limitations on the Senate's impeachment proceedings, and in enforcing any such limits.

The question then is whether the Constitution assigns to the Senate alone not only the sole power to try impeachments, but

also the sole power to decide what procedures constitute a trial. The implications of respondents' position on nonreviewability are truly disturbing. Indeed, even the district court agreed that petitioner would present a justiciable and likely meritorious challenge "if he were convicted without any semblance of a trial." App. B at 68a. For example, if the Senate had voted to convict based solely on what the Senators had heard or read in the media about the judge's trial, or if the Senate decided to flip a coin to decide whether to convict, surely the Senate's action would not be a trial. Similarly, it would be difficult to conclude that the Senate conducted a "trial," if it had voted to convict an individual without any trial-type proceedings, based solely upon that individual's conviction by a court of a felony, as one of the articles of impeachment of Judge Harry E. Claiborne invited the Senate to do. H. Res. 461, Article III (July 22, 1986), *reprinted in Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, a Judge of the United States District Court for the District of Nevada*, 99th Cong., 2d Sess. at 3 (S. Doc. No. 99-48, 1986). Or, as the court of appeals judge who dissented on the justiciability issue observed, petitioner would present a cognizable claim if the Senate had delegated the power to try impeachments to a randomly chosen group of schoolchildren. *See* App. A at 42a (Edwards, J.) Yet, according to respondents, the courts could do nothing about any of these clear violations of the command to the Senate to "try" all impeachments.

In contrast, it is our view that the constitutional direction to the Senate to "try" all impeachments carries with it *some* judicially enforceable limitations on the process by which the Senate may convict and remove civil officers from office. However, the fact that there are some limits does not mean that the Senate is left with no discretion in formulating appropriate trial procedures. Not every procedural right that attaches in criminal proceedings, ranging from discovery rights to evidentiary rules, must necessarily be incorporated into impeachment trials by virtue of the command to the Senate to "try" impeachments. However, based on the Constitution, its history, and its aftermath, this Court can determine what limitations adhere to the direction to the Senate to "try" all impeachments, and then it can enforce those limitations. That kind of ruling, however, is a ruling on the merits and

not an application of the political question doctrine. Thus, even if the Court decides that petitioner has no judicially enforceable right to a trial before the full Senate, the Court will not have abstained from ruling, but rather will have pronounced the meaning of the constitutional command at issue and decided whether it was violated. In short, this case does not involve a political question, but rather raises a difficult constitutional question concerning the meaning of the term "try" in Article I, section 3, clause 6.

CONCLUSION

For the reasons set forth above, the court of appeals decision that this case presents a nonjusticiable controversy should be reversed.

Respectfully submitted,

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